

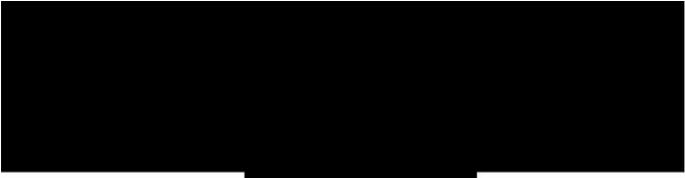


U.S. Citizenship
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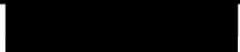
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: APR 24 2009

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IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook.

The record indicates that the director denied the I-140, Immigrant Petition for Alien Worker on May 4, 2007. The petitioner submitted a notice of appeal on a Form EOIR-29 (notice of appeal to the Board of Immigration Appeals from a decision of an INS Officer) rather than a Form I-290B, Notice of Appeal to Administrative Appeals Unit. Additionally, United States Citizenship and Immigration Services (USCIS) records indicate that the notice of appeal was filed on May 31, 2007 with either no fee or an incorrect fee. The director rejected it on May 31, 2007 and sent a rejection notice indicating that a priority or processing date to the appeal could not be assigned because it had not been properly filed with the correct filing fee. 8 C.F.R. § 103.2(a)(7)(i).

The petitioner submitted a revised notice of appeal on June 15, 2007. The regulation at 8 C.F.R. § 103.3(a)(2) requires an affected party to file the complete appeal within 30 days after service of the decision, or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. Title 8 C.F.R. § 103.2(a)(7)(i) requires USCIS to reject any petition or application filed with the incorrect filing fee. Likewise, filings, which are rejected because they are submitted with incorrect filing fees, do not retain filing dates. Therefore, in this matter, USCIS is required to reject the appeal as untimely filed. Although the petitioner initially submitted the notice of appeal within 33 days of service of the decision, this submission included an incorrect or no filing fee. Here, the appeal accepted for filing¹ was not submitted until June 15, 2007, or nine days after the deadline for appealing the director's decision, which was June 6, 2007.

USCIS, which includes both the Nebraska Service Center and the AAO, has no authority to accept an untimely appeal that fails to hold a timely filing date due to the submission of an incorrect filing fee. USCIS is compelled to reject such an appeal. Title 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states in pertinent part that "[a]n appeal which is not timely filed within the time allowed must be rejected as improperly filed." Therefore, under the regulations, USCIS lacks the authority to consider the untimely appeal. It is noted that although the information contained on the cover page of the director's decision may have erroneously stated the filing fee, it remains the petitioner's burden to file a timely appeal. An untimely appeal shall be rejected as improperly filed. *See* 8 C.F.R. § 103.3(a)(2)(v)(B)(1).²

¹ It is noted that the 8 C.F.R. § 103.3(a)(iii) does require the official making the decision to state the appellate jurisdiction and furnish the appropriate appeal form.

² Alternatively, the appeal might also be summarily dismissed pursuant to 8 C.F.R. § 103.3(a)(1)(v), which states that an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The petitioner here only alleged that, "it has the ability to pay the proffered wage," and that it "will overcome the points

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2) or a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider as the petitioner failed to submit any evidence to address or overcome the basis for the appeal. Therefore, the appeal must be rejected.

ORDER: The appeal is rejected as untimely filed.

raised in the decision and present additional documentation.” The petitioner failed to submit any further documentation or specifically address the points raised by the director.